

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 6, 2003

Ms. Christy W. Wallace
Assistant Secretary
University of Texas Investment Management Company
221 West Sixth Street, Suite 1700
Austin, Texas 78701

OR2003-0098

Dear Mr. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174510.

The University of Texas Investment Management Company (the "UTIMCO") received a request for six categories of information contained in the partnership agreements for: Candover 2001 Fund ("Candover"), JW Childs Equity Partners, III ("JW"), Prism Venture Partners II-A, L.P. ("Prism II-A"), 3i Europartners IIA ("3i"), Advanced Technology Ventures VII, L.P. ("Advanced Tech"), American Securities Partners III ("American"), Atlas Ventures VI ("Atlas"), Polaris Venture Partners IV ("Polaris"), Prism Venture Partners IV, L.P. ("Prism IV"), Prospect Venture Partners II ("Prospect"), Baker Communications II ("Baker"), and Carlyle Partners III ("Carlyle"). Although you do not take a position with respect to the release of the requested information, you state that some of the requested information may implicate the privacy or property interest of third parties. You indicate, and provide documentation showing, that UTIMCO notified each of the third parties of the request for information in order to afford each entity an opportunity to supply objections to release of the submitted information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered all submitted arguments and reviewed the submitted information. We have also considered the arguments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

American and Baker argue that, as the requested information is not subject to section 552.022 of the Government Code, it does not constitute public information under the Public Information Act (the "Act"). Section 552.022, however, does not serve as an exhaustive list

of public information or as an exception to the release of information by negative implication. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law or, in the case of completed reports, if excepted under section 552.108 of the Government Code. See Gov't Code § 552.022 (Section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter."). Moreover, section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." As the requested information is information collected, assembled, or maintained by UTIMCO in connection with the transaction of official business, it is subject to the Act.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, JW and Carlyle have not submitted to this office their reasons explaining why their respective information should not be released. Therefore, JW and Carlyle have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the information pertaining to JW and Carlyle must be released to the requestor.

Candover states that it does not object to the release of its information responsive to categories 1 and 2 of the request. Prospect states that it does not object to the release of its information regarding its total capitalization or the date of first closing. Further, 3i informs UTIMCO, and UTIMCO informs this office, that it does not object to the release of its information responsive to categories 1 and 2 of the request, or to the release of some of the information responsive to categories 3 through 6 of the request. Thus, such information must be released to the requestor.

Polaris argues that its information must be withheld from disclosure because its partnership agreements contains a confidentiality agreement restricting the use and release of information relating to its operations and activities. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. See Open Records Decision Nos. 514 at 1

(1988), 476 at 1-2 (1987, 444 at 6 (1986)). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

Advanced Tech. American. Atlas, Baker, Polaris, and Prism argue that the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The purpose of section 552.104 is to protect the purchasing interests of governmental bodies in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* As UTMCO does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Thus, the system may not withhold any of the submitted information under section 552.104.

Similarly, American and Baker contend that their respective information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Like section 552.104, section 552.112 is designed to protect the interests of a governmental body, not third parties. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.--Austin 1999, pet. denied). Because UTMCO does not raise section 552.112, this section also is not applicable to the requested information. *Id.*

Candover and 3i argue that the requested information implicates third party privacy interests. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining

personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

We note, however, that common-law privacy is designed primarily to protect human feelings and sensibilities, rather than to safeguard property, business, or other pecuniary interests. See Open Records Decision No. 192 at 4 (1978); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We find that none of the submitted information is confidential under common-law privacy.

Candover and 3i also argue that their respective information must be withheld under section 552.101 because "[p]artnership agreements are not documents of public record in England." Candover and 3i, however, have not provided sufficient information for us to consider this argument. Therefore, none of the submitted information may be withheld from disclosure under section 552.101 of the Government Code.

Advanced Tech, American, Atlas, Baker, Candover, Polaris, Prism II-A, Prism IV, Prospect, and 3i argue that some or all of the information in their respective proposals must be withheld under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Ms. Christy W. Wallace - Page 5

Restatement of Torts §757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Advanced Tech, American, Atlas, Baker, Candover, Polaris, Prism II-A, Prism IV, Prospect, and 3i contend that their information is excepted under section 552.110(a). They contend that information revealing the extent of investment and borrowing restrictions, the mechanisms for allocating profits and losses between the general partners and limited

partners, the mechanism for distributing partnership property, the basis for calculating management fees, and the amount of capital invested by the General Partner is trade secret information. Advanced Tech, American, Atlas, Baker, Candover, Polaris, Prism II-A, Prism IV, and 3i explain that the terms of their respective agreements are the result of negotiations with their respective general and/or limited partners. Thus, we find that Advanced Tech, American, Atlas, Baker, Candover, Polaris, Prism II-A, Prism IV, and 3i have not adequately demonstrated that such information consists of "a process or device for continuous use in the operation of the business." Therefore, we find that UTMCO may not withhold any of the submitted information pertaining to Advanced Tech, American, Atlas, Baker, Candover, Polaris, Prism II-A, Prism IV, or 3i under the trade secret prong of section 552.110. *See* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

On the other hand, Prospect explains in detail that the structure of its fund "is not one that is used only in this single agreement." Prospect states that it "specifically anticipates offering other funds using essentially the identical terms" contained in its requested partnership agreement. Prospect also provides extensive arguments in support of each of the six factors used to determine whether information qualifies as a trade secret. Further, we have not received any arguments that rebut Prospect's claims as a matter of law. Thus, based on Prospect's explanation, we agree that, with the exception of the information regarding Prospect's total capitalization and the date of first closing, UTMCO must withhold the submitted information pertaining to Prospect under section 552.110(a).

In addition, Advanced Tech, American, Baker, Candover, Polaris, Prism II-A, and Prism IV contend that release of information regarding the extent of investment and borrowing restrictions, the mechanism for allocating profits and losses between the general partners and limited partners, the mechanism for distributing partnership property, and the basis for calculating management fees would cause them substantial competitive harm. Despite such arguments, we find that the public has a strong interest in UTMCO's compensation arrangement with Advanced Tech, American, Baker, Candover, Polaris, Prism II-A, and Prism IV, as reflected in such information. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see also* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process); Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152 (disclosure of prices charged the government is a cost of doing business with the government). Further, we find that Advanced Tech, American, Baker, Candover, Polaris, Prism II-A, and Prism IV have failed to demonstrate the applicability of section 552.110(b) to their remaining information. Consequently, we find that UTMCO may not withhold the information relating to Advanced Tech, American, Baker, Candover, Polaris, Prism II-A, or Prism IV based on the commercial or financial information prong of section 552.110 of the Government Code.

In summary, (1) we have marked the information pertaining to Prospect that UTIMCO must withhold under section 552.110(a); and (2) the remaining requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 174510

Enc: Submitted documents

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CAUSE NO. GN300181

AMERICAN SECURITIES CAPITAL	§	IN THE DISTRICT COURT OF
PARTNERS, LLC,	§	
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	
Defendant.	§	261 st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff American Securities Capital Partners, LLC (ASC), and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, A. L. Mark O'Hare, was sent reasonable notice of this setting and of the parties' agreement that the University of Texas Investment Management Company (UTIMCO) must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

FILED
03 NOV 24 AM 8:18
Amari Rodriguez-Ramirez
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

1. The information at issue, specifically, Article I (only those 40 definitions that have been highlighted on the copy of the LPA maintained in the office of UTIMCO); Article II, Clauses 2.7, 2.9, 2.10; Article III, 3.1(a), (b)(iii), (e)-(g), (i), 3.2-3.5; Article IV, 4.2(c), 4.3-4.8, 4.10; Article V, 5.1-5.3, 5.4(a), (b), (g), 5.5; Article VI; Article VIII, Clauses 8.1-8.6, 8.8; Articles IX and X, and Annexes A and B, whether contained in the LPA or in the report prepared by UTIMCO, is excepted from disclosure by Tex. Gov't Code § 552.110(a);

2. The UTIMCO must withhold from the requestor the information at issue;

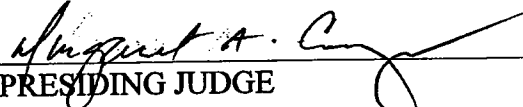
3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and


5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and

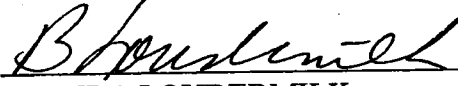
Defendant and Interested Third Party and is a final judgment.

SIGNED this the 24 day of November, 2003.


PRESIDING JUDGE

APPROVED:


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